

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
GCI Cable, Inc.)	CSR-7130-Z
)	
Request for Waiver of Section 76.1204(a)(1) of the Commission's Rules)	
)	
Implementation of Section 304 of the Telecommunications Act of 1996)	CS Docket No. 97-80
)	
Commercial Availability of Navigation Devices)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: May 4, 2007

Released: May 4, 2007

By the Chief, Media Bureau:

I. INTRODUCTION

1. GCI Cable, Inc. d/b/a GCI ("GCI") has filed with the Chief of the Media Bureau the above-captioned request for waiver (the "Waiver Request") of the ban on integrated set-top boxes set forth in Section 76.1204(a)(1) of the Commission's rules.¹ Specifically, GCI seeks a waiver of the integration ban for all new set-top boxes issued after July 1, 2007. For the reasons stated below, we partially grant GCI's Waiver Request pursuant to Sections 1.3 and 76.7 of the Commission's rules, subject to the conditions set forth herein.²

II. BACKGROUND

2. Section 629(a) of the Communications Act of 1934, as amended (the "Act"), requires the Commission to:

adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.³

¹ 47 C.F.R. § 76.1204(a)(1). The separation of the security element from the host device required by this rule is referred to as the "integration ban."

² 47 C.F.R. §§ 1.3, 76.7.

³ 47 U.S.C. § 549(a).

Through Section 629, Congress intended to ensure that consumers have the opportunity to purchase navigation devices from sources other than their multichannel video programming distributor (“MVPD”).⁴ Congress characterized the transition to competition in navigation devices as an important goal, stating that “[c]ompetition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality.”⁵ At the same time, Congress recognized that MVPDs have “a valid interest, which the Commission should continue to protect, in system or signal security and in preventing theft of service.”⁶ Similarly, Congress also sought to avoid Commission actions “which could have the effect of freezing or chilling the development of new technologies and services.”⁷ Under Section 629(c), therefore, the Commission may grant a waiver of its regulations implementing Section 629(a) when doing so is necessary to assist the development or introduction of new or improved services.⁸

3. To carry out the directives of Section 629, the Commission in 1998 required MVPDs to make available by July 1, 2000, a security element separate from the basic navigation device (the “host device”).⁹ The integration ban was designed to enable unaffiliated manufacturers, retailers, and other vendors to commercially market host devices while allowing MVPDs to retain control over their system security. MVPDs were permitted to continue providing equipment with integrated security until January 1, 2005, so long as modular security components, known as point-of-deployment modules (“PODs”),¹⁰ were also made available for use with host devices obtained through retail outlets. In April 2003, in response to a request from cable operators, the Commission extended the effective date of the integration ban until July 1, 2006.¹¹ Then, in 2005, again at the urging of cable operators,¹² the Commission further extended that date until July 1, 2007.¹³ In that decision, the Commission stated that it would “entertain certain requests for waiver of the prohibition on integrated devices for limited capability integrated digital cable boxes.”¹⁴

4. On January 10, 2007, the Media Bureau acted upon three requests for waiver of Section 76.1204(a)(1) of the Commission’s rules.¹⁵ The Bureau found that waiver was not warranted for any of

⁴ See S. REP. 104-230, at 181 (1996) (Conf. Rep.). See also *Bellsouth Interactive Media Services, LLC*, 19 FCC Rcd 15607, 15608, ¶ 2 (2004).

⁵ H.R. REP. NO. 104-204, at 112 (1995).

⁶ *Id.*

⁷ S. REP. 104-230, at 181 (1996) (Conf. Rep.).

⁸ 47 U.S.C. § 549(c).

⁹ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775, 14808, ¶ 80 (1998) (“*First Report and Order*”); 47 C.F.R. § 76.1204(a)(1).

¹⁰ For marketing purposes, PODs are referred to as “CableCARDS.”

¹¹ *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 18 FCC Rcd 7924, 7926, ¶ 4 (2003).

¹² *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, 20 FCC Rcd 6794, 6802-03, ¶ 13 (2005) (“*2005 Deferral Order*”), *pet. for review denied*, *Charter Communications, Inc. v. FCC*, 460 F.3d 31 (D.C. Cir. 2006).

¹³ *Id.* at 6814, ¶ 31.

¹⁴ *Id.*

¹⁵ See *Bend Cable Communications, LLC d/b/a BendBroadband Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, 22 FCC Rcd 209 (2007) (“*BendBroadband Order*”); *Cablevision Systems Corporation’s Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, 22 FCC Rcd 220 (2007) (“*Cablevision Order*”); *Comcast Corporation Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, 22 FCC Rcd 228 (2007) (“*Comcast Order*”). Collectively, these orders are referred to as the “*January 10 Orders*.”

the parties pursuant to Section 629(c) because none of the parties had demonstrated that waiver was necessary to assist in the development or introduction of a new or improved service.¹⁶ The Bureau also found that devices with two-way functionality did not meet the waiver policy announced in the 2005 *Deferral Order* for low-cost, limited-capability set-top boxes.¹⁷ The Bureau found good cause, however, to conditionally grant Bend Cable Communications d/b/a BendBroadband (“BendBroadband”) a waiver of Section 76.1204(a)(1) of the Commission’s rules.

5. In the *BendBroadband Order*, the Bureau “recognize[d] that the ability to rapidly migrate to an all-digital network would produce clear, non-speculative public benefits,” and therefore conditionally granted BendBroadband’s waiver request pursuant to Sections 1.3 and 76.7 of the Commission’s rules.¹⁸ As a condition of waiver, the Bureau determined that BendBroadband first must: (1) file with the Media Bureau a sworn declaration in which it commits to move to an all-digital network by 2008; (2) notify all of its analog customers of its plans to go all digital at least six months in advance of that event and submit a sworn declaration to the Commission confirming that such notice has been provided; (3) ensure that, at least six months prior to its migration to an all-digital network, it has in its inventory or has placed orders for enough set-top boxes to ensure that each of its customers can continue to view BendBroadband’s video programming on their television sets and submit a sworn declaration to the Commission confirming that this is the case; and (4) publicly commit to the plan by sworn declaration.¹⁹

A. The Waiver Request

6. Pursuant to Sections 1.3 and 76.7 of the Commission’s rules, GCI seeks waiver of the integration ban to allow it to continue to place into service new integrated digital cable set-top boxes after July 1, 2007. GCI argues that the public interest benefits associated with its commitment to transition to an all-digital network by February 17, 2009,²⁰ are sufficient to justify a waiver, and argues that the Media Bureau made a similar finding in the *BendBroadband Order*.²¹ GCI maintains that the application of the integrated set-top box ban would divert capital and operational resources, thus impeding its transition to an all-digital network by February 17, 2009.²² According to GCI, an all-digital conversion will facilitate the DTV transition, enable expanded service offerings, promote efficient use of the spectrum, deliver broadband services, spur competitive entry, and expand universal service.²³ If its Waiver Request is

¹⁶ *BendBroadband Order*, 22 FCC Rcd at 213-214, ¶¶ 11-15; *Cablevision Order*, 224-225, ¶¶ 12-16; *Comcast Order*, 22 FCC Rcd at 235-238, ¶¶ 15-23.

¹⁷ *BendBroadband Order*, 22 FCC Rcd at 214-215, ¶¶ 16-20; *Comcast Order*, 22 FCC Rcd at 238-241, ¶¶ 24-30.

¹⁸ *BendBroadband Order*, 22 FCC Rcd at 218, ¶ 27.

¹⁹ *Id.* at 218, ¶ 26.

²⁰ GCI has committed to complete its transition to an all-digital cable system by the deadline for the transition to digital television broadcasting imposed by Congress. Section 309(j)(14)(A) of the Communications Act states that “[a] full-power television broadcast license that authorizes analog television service may not be renewed to authorize such service for a period that extends beyond February 17, 2009.” 47 U.S.C. § 309(j)(14)(A). *See also Comcast Corporation*, Memorandum Opinion and Order, 22 FCC Rcd 228, 242, ¶ 34 (2007) (“[G]rant[ing] Comcast leave to file an amended waiver request that ... seeks waiver based on a commitment to go all-digital by a date-certain such as February 2009 or sooner, when broadcasters will cease their analog operations.”).

²¹ Waiver Request at 6.

²² *Id.* at 6-8.

²³ *Id.* at 8-11.

granted, GCI plans to reclaim the spectrum now used for analog channels for expanded video service offerings, increased broadband capacity, and other new digital services.²⁴

7. GCI states that the success of the digital transition “hinges upon” the availability of affordable set-top boxes, and that, to date, low-cost compliant set-top boxes are not being produced.²⁵ GCI estimates that if it is required to provide CableCARD-enabled boxes, “it would incur a more than two-fold increase in standard box acquisition costs and near 20 percent increase in digital video recorder (“DVR”) boxes in order to obtain compliant devices.”²⁶ GCI states that this increase would be felt by its existing cable television subscribers and might deter price-sensitive analog customers from considering a digital option.²⁷

8. Further, GCI asserts that in the absence of the requested waiver, the digital transition in Alaska will be prolonged and demand for converter box subsidies by Alaskan consumers will increase.²⁸ It also asserts that waiver for the low-end boxes would not undermine the goal of a competitive navigation device market because GCI has no ability to drive manufacturing demand, production, or pricing of navigation devices in Alaska.²⁹

9. GCI states that grant of the Waiver Request would allow it to focus its capital and operational resources on other new digital services such as expanded video service offerings, cable-delivered telephone, and other advanced services.³⁰ GCI requests that if the relief requested is limited in some manner, the Bureau should defer enforcement of the July 1, 2007, deadline until such time that suppliers of compliant equipment can fill orders in the same timeframe as they do for large-MSO customers.³¹

10. Although GCI seeks a waiver for “all new set-top boxes issued post-integration ban,” it states that it “primarily relies” on the Motorola DCT-700, DCT-1000, and DCT-2000 to deliver standard services to all customers not subscribing to digital video recorder services or high definition channels and does not identify any other set-top boxes in its waiver request.³² Because the Waiver Request does not refer to any other specific models, this Order considers GCI’s request solely with regard to the Motorola DCT-700, DCT-1000, and DCT-2000.³³

²⁴ *Id.* at 9-11.

²⁵ *Id.* at 8.

²⁶ *Id.* at 5.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 12-13.

³⁰ *Id.* at 9-11.

³¹ *Id.* at 15-16.

³² Waiver Request at 2, 5.

³³ As noted below, GCI may identify additional set-top boxes for which it seeks waiver and the Commission will make a determination as to whether those boxes are eligible for the waiver granted herein.

B. Comments

11. The Waiver Request was placed on public notice on March 13, 2007.³⁴ Two parties filed comments in response to the Waiver Request. GCI also filed a reply to these comments. The comments filed by Motorola, Inc. (“Motorola”) strongly supported grant of a waiver for GCI. Motorola echoes GCI’s assertion that denial of its waiver would have “real-world negative effects” on its digital transition plans.³⁵ Motorola posits that denial of GCI’s waiver request would force it to purchase costlier CableCARD-enabled boxes, which would “divert capital from network conversion, diminish consumer interest in taking digital services, and slow the recapture of analog spectrum for new video services, faster broadband speeds, and competitive phone services,” as well as “impair GCI’s ability to compete effectively against DBS providers ... and new telco video entrants.”³⁶

12. The Consumer Electronics Association (“CEA”) believes that grant of the Waiver Request would “not improve GCI’s access to integrated devices as the industry shifts to CableCARD reliance,” but would “perpetuate the niche status of CableCARD-reliant devices,” thereby frustrating Congress’s goal of robust competition in cable navigation devices.³⁷ CEA also states that GCI’s “diversion of resources” argument is not a valid basis for avoiding compliance with the rule, asserting that such an argument is “tantamount to challenging the common reliance rule in its entirety....”³⁸ Finally, CEA notes that a “waiver for distributing security-integrated DVRs” would effectively “shut innovative DVR products out of the market just as they are poised to become a viable alternative.”³⁹

13. In reply, GCI argues that the Waiver Request meets the standard established in the *BendBroadband Order* and that CEA fails to justify why a departure from precedent is warranted.⁴⁰ GCI further asserts that, contrary to CEA’s assertions, it has demonstrated the “tangible public interest benefits” that would flow from grant of its waiver request.⁴¹ GCI also rejects CEA’s assumption that integrated equipment will eventually no longer be available as “self-serving,” “speculative,” and “irrelevant to assessing the substantive merits of any waiver request.”⁴² Finally, GCI claims that the viability of CableCARD-reliant DVRs has no bearing on GCI’s specific case for waiver.⁴³

III. DISCUSSION

14. GCI submitted its Waiver Request under the general waiver provisions found in Sections 1.3⁴⁴ and 76.7⁴⁵ of the Commission’s rules. GCI seeks relief that is nearly identical to that afforded

³⁴ See *Special Relief and Show Cause Petitions*, Public Notice, Report No. 0202 (Mar. 13, 2007).

³⁵ Motorola Comments at 4.

³⁶ *Id.* at 4-5.

³⁷ CEA Comments at 1.

³⁸ *Id.* at 2.

³⁹ *Id.* at 2-3.

⁴⁰ GCI Reply at 2.

⁴¹ *Id.* at 3.

⁴² *Id.* at 4.

⁴³ *Id.* at 3.

⁴⁴ See 47 C.F.R. § 1.3 (“Any provision of the rules may be waived by the Commission on its own motion . . . if good cause therefor is shown.”).

BendBroadband.⁴⁶ In the *BendBroadband Order*, the Bureau “recognize[d] that the ability to rapidly migrate to an all-digital network would produce clear, non-speculative public benefits,” particularly when considered in the context of the Commission’s goal of promoting the broadcast television digital transition.⁴⁷ The Bureau conditionally granted BendBroadband’s waiver request pursuant to Sections 1.3 and 76.7 of the Commission’s rules,⁴⁸ subject to BendBroadband’s submission of a sworn declaration stating that it would take specific steps, as outlined in the *BendBroadband Order*, to demonstrate its commitment to an all-digital network within its stated timeframe.

15. We find that the same non-speculative public interest benefits are present in the instant case. GCI’s plan to migrate to an all-digital network, if accomplished within the timeframe set forth in the Waiver Request and its sworn declaration (*i.e.*, by February 17, 2009), would be sufficient to show good cause for a waiver under Sections 1.3 and 76.7. As GCI points out, the transition to an all-digital network requires every analog device in a cable subscriber’s home to have a converter box.⁴⁹ GCI also claims that grant of the Waiver Request would ensure that its subscribers would be able to view digital broadcast signals after the end of the DTV transition.⁵⁰ In addition, GCI states that it could use the bandwidth reclaimed to offer expanded video service offerings, such as HD and VOD,⁵¹ as well as broadband and cable-delivered telephone service.⁵²

16. Moreover, we disagree with CEA’s assertions that the Waiver Request should be denied because of its potential impact upon competition in cable navigation devices and the common reliance rule. As discussed above and in the *BendBroadband Order*, we believe that a firm commitment to migrate to an all-digital network by a date certain would produce clear, non-speculative public interest benefits that, on balance, warrant grant of the Waiver Request.⁵³

17. Accordingly, if GCI: (1) files with the Media Bureau a sworn declaration in which it commits to move to an all-digital network on or before February 17, 2009;⁵⁴ (2) notifies all of its analog

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⁴⁵ See 47 C.F.R. § 76.7 (“On petition by any interested party, ... the Commission may waive any provision of this part 76,”).

⁴⁶ GCI seeks to continue to transmit analog signals until February 17, 2009. GCI Reply at 1.

⁴⁷ See, e.g., *Second Periodic Review of the Commission’s Rules and Policies Affecting the Conversion To Digital Television*, FCC 07-69, ¶¶ 9-14 (rel. May 3, 2007) (adopting a labeling requirement for analog-only television receivers while noting that “[t]he government has a strong interest in ensuring a timely conclusion of the digital transition”); *Requirements for Digital Television Receiving Capability*, 21 FCC Rcd. 9478, 9480, ¶ 7 (2006) (stating that “consumers must be able to receive digital TV signals for the DTV transition to move forward to a successful completion”); *Requirements for Digital Television Receiving Capability*, 20 FCC Rcd 18607, 18609, ¶ 6 (2005) (stating that consumers’ ability to receive digital TV signals is essential to a successful completion of the DTV transition). See also *BendBroadband Order*, 20 FCC Rcd at 217, ¶ 24.

⁴⁸ *Id.* at 218, ¶ 27.

⁴⁹ Waiver Request at 8.

⁵⁰ *Id.* at 2, 9. GCI states that there are currently 8,500 basic subscribers that do not currently have a converter box. *Id.* at 9.

⁵¹ *Id.* at 9.

⁵² *Id.* at 2 (citing *BendBroadband Order*, 22 FCC Rcd at 217-218, ¶¶ 24-25).

⁵³ See *BendBroadband Order*, 22 FCC Rcd at 216-218, ¶¶ 21-26.

⁵⁴ Although GCI’s target date for transitioning to an all-digital cable system is slightly longer than that permitted in the *BendBroadband Order*, we believe the additional period requested by GCI to transition to an all-digital system is of a reasonably short duration such that it is generally consistent with the deadline imposed upon BendBroadband.

(continued....)

customers of its plans to go all digital at least one year in advance of that event and again six months in advance of that event, and submits a sworn declaration to the Commission confirming that such notice has been provided; (3) ensures that, at least one year prior to its migration to all digital, it has in its inventory or has placed orders for enough set-top boxes to ensure that each of its customers can continue to view GCI's video programming on their television sets and submits a sworn declaration to the Commission confirming that this is the case, and (4) publicly commits to this plan by sworn declaration, we conclude that, with respect to the DCT-700, DCT-1000 and DCT-2000, GCI will have met the standard for waiver of the integration ban under Sections 1.3 and 76.7 of the Commission's rules.⁵⁵ As we explained in the *BendBroadband Order*, such a declaration will "demonstrate [GCI's] commitment to move to an all-digital network."⁵⁶ While the analysis in this Memorandum Opinion and Order and the waiver granted herein are limited to the set-top boxes identified by GCI in its waiver request, we note that GCI may identify additional set-top boxes for which it seeks waiver and the Commission will make a determination as to whether those boxes are eligible for the waiver granted herein.

18. As to GCI's deferment request with regard to other set-top boxes that may otherwise be ineligible for waiver, we understand the difficulties that small cable operators may face in complying with the July 1, 2007 deadline, particularly since manufacturers may prioritize orders from the largest cable operators.⁵⁷ In the *BendBroadband Order*, we indicated that small operators could request deferment of the July 1, 2007, deadline if they could demonstrate that they have placed orders for compliant set-top boxes⁵⁸ that will not be fulfilled in time for them to comply with the deadline.⁵⁹ We deny GCI's request to the extent that it has failed to substantiate its efforts to comply with the July 1, 2007, deadline with supporting documentation. However, we will reconsider GCI's request if it submits a signed affidavit that: (1) states that it has placed an order for a sufficient number of compliant boxes that, if filled, would satisfy GCI's equipment needs, specifies the number of boxes ordered, and provides information to support its statement that the number of compliant boxes ordered would be sufficient, if the order could be filled; (2) states that the manufacturer has informed it that the order will not be filled by July 1, 2007; (3) sets forth when the order will be filled; (4) requests deferral of the integration ban until that time; (5) states that it intends to order only enough integrated boxes to meet its needs until compliant boxes can be obtained, indicates how many such boxes it will be ordering and provides information to support those numbers; and (6) attaches all relevant documentation, including order forms and correspondence with its

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The key to the public interest analysis is that GCI's transition will be complete by the February 17, 2009 deadline for the DTV transition.

⁵⁵ While GCI has submitted a declaration stating that it will meet the conditions listed in the *BendBroadband Order*, because GCI has asked for additional time to complete its transition to all digital, we have revised the timeframe from that which was required of BendBroadband with regard to subscriber notification of the DTV deadline (from a single notification 6 months prior to the transition to all digital to two notifications, one a year in advance and a second 6 months in advance) and the inventory requirement (from 6 months to one year) in order to ensure that GCI fully takes advantage of that additional time to prepare for, and educate its subscribers regarding, its all-digital migration. As such, the declaration that GCI submitted in connection with its Waiver Request does not comport with the conditions described above and must be resubmitted. See Affidavit of G. Wilson Hughes, General Communications, Inc.

⁵⁶ See *BendBroadband Order*, 22 FCC Rcd at 216, ¶ 21. It is important that GCI notify its analog customers about the impending transition to an all-digital network to ensure that its subscribers understand that devices that are not equipped with CableCARDS will not receive cable service without a set-top box, and to provide those subscribers with ample time to order CableCARDS or request set-top boxes from GCI.

⁵⁷ See *BendBroadband Order*, 22 FCC Rcd at 212-213, ¶ 10.

⁵⁸ This includes both low-cost and high-end compliant boxes.

⁵⁹ See *BendBroadband Order*, 22 FCC Rcd at 212-213, ¶ 10.

manufacturers.⁶⁰ We will treat that documentation as confidential upon GCI's request, consistent with our rules and policies regarding confidential information.⁶¹

IV. ORDERING CLAUSES

19. Accordingly, **IT IS ORDERED** that, pursuant to Sections 1.3 and 76.7 of the Commission's rules, 47 C.F.R. §§ 1.3, 76.7, GCI Cable, Inc.'s Request for Waiver of Section 76.1204(a)(1) of the Commission's rules, 47 C.F.R. § 76.1204(a)(1), **IS CONDITIONALLY GRANTED IN PART AND DENIED IN PART**, to the extent described above.

20. This action is taken pursuant to authority delegated by Section 0.283 of the Commission's rules, 47 C.F.R. § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

Monica Shah Desai
Chief, Media Bureau

⁶⁰ GCI does not appear to limit its deferral request to its initial order of compliant boxes, but instead claims that it "typically waits an average of up to six months longer than large companies for its orders to be filled for existing product lines." *Waiver Request* at 16. To the extent that GCI can demonstrate, pursuant to the procedures set forth herein, that it continues to experience difficulties in obtaining compliant devices even after delivery of its initial order, it may request additional relief. Integrated boxes obtained pursuant to this extended relief should be limited to those needed to supplement the compliant boxes GCI is able to obtain (*i.e.*, GCI should not request relief in order to obtain integrated boxes when, or to the extent that, compliant boxes are available for purchase).

⁶¹ See generally 47 C.F.R. § 0.459; *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, 13 FCC Rcd 24816 (1998).